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United States

ASSOCIATION OF CALIFORNIA WATER AGENCIES; ANTELOPE VALLEY-EAST KERN WATER AGENCY; CASTAIC LAKE WATER AGENCY; COACHELLA VALLEY COUNTY WATER DISTRICT; CRESTLINE-LAKE ARROWHEAD WATER AGENCY; DESERT WATER AGENCY; KERN COUNTY WATER AGENCY; THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA; MOJAVE WATER AGENCY; SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT; and SAN GABRIEL VALLEY MUNICIPAL WATER DISTRICT,

Petitioners,

vs.

THE UNITED STATES OF AMERICA; THE DEPARTMENT OF THE INTERIOR; and JAMES G. WATT, SECRETARY OF THE DEPARTMENT OF THE INTERIOR,

Respondents.

ENVIRONMENTAL DEFENSE FUND; SIERRA CLUB; CALIFORNIA TROUT; and SAVE THE AMERICAN RIVER ASSOCIATION,

Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I

Can the United States Secretary of the Interior add a river to the National Wild and Scenic Rivers System under the provisions of the federal Wild and Scenic Rivers Act by:

A. Overriding a contemporaneous state court ruling that state law requires further State Legislative action before the state will be committed to permanently administer the river in the manner required by the Federal Act?

B. Determining that the State Legislature has adequately designated a river as wild, scenic or recreational, when the State Legislature has expressly ordered further studies of the need to remove such designation and construct water supply and flood control facilities prohibited by the Federal Act?

II

Did the Court of Appeals err in:

A. Dismissing as harmless "trivial error" the violation of federal regulations by "lame duck" federal officials through the use of a false affidavit when, absent that violation, the outgoing Secretary of the Interior would have been unable to deprive California of control over its own waters?

B. Failing to independently review the Secretary of the Interior's interpretation of applicable state and federal law, including his rejection of a contemporaneous state court ruling?

C. Refusing to allow trial on disputed factual issues on the Third Cause of Action, after the district court had denied petitioners' motion for summary judgment on that cause on the basis that it required determination of triable issues of material fact?

PARTIES TO THE ACTION

All current parties to this action appear in the caption of this case. The Ninth Circuit Court of Appeals consolidated this case with two related cases, both of which bear the caption "*County of Del Norte, et al. v. United States of America, et al./Environmental Defense Fund, et al.*" (hereinafter sometimes referred to as the "North Coast interests' " cases), Ninth Circuit Court of Appeals docket numbers 83-1761 and 83-2018. If, as petitioners expect, the North Coast interests also petition this Court for certiorari, the parties shown in the caption of that petition will also have relevance to this case.

The State of California was an intervenor in the district court action below, but did not pursue an appeal to the Ninth Circuit Court of Appeals.

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CITATIONS TO OPINIONS BELOW

The administrative agency's action is commemorated by a "Notice of Approval for Inclusion . . ." which was published in the *Federal Register* at 46 Fed.Reg. 7484-01, January 23, 1981. The text of the notice is reproduced in the Appendix to this Petition at App. 82-86.

The opinion of the district court was not officially published, but it is reproduced in the Appendix to this Petition at App. 21-34 (Memorandum of Decision) and App. 35-37 (Judgment). The district court's Memorandum of Decision is unofficially published at 19 ERC 1138.

The May 11, 1984 opinion of the Ninth Circuit Court of Appeals is reported at 732 F.2d 1462, but its July 5, 1984 order denying rehearing has not been published. The Ninth Circuit Court of Appeals' opinion and order denying rehearing are reproduced in the Appendix to this Petition at App. 1-10 (Opinion) and App. 11 (Order).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued and entered its opinion on May 11, 1984, and denied the petition for rehearing on July 5, 1984. Pursuant to Rules of the Supreme Court of the United States, Rules 20.2 and 20.4, and 28 U.S. Code, Section 2101, subdivision (c), a petition for writ of certiorari is therefore due by October 3, 1984. Petitioners invoke this Court's jurisdiction under 28 U.S. Code, Section 1254, subdivision (1), and Rules of the Supreme Court of the United States, Rule 17.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the interpretation of the following constitutional provisions, statutes, and regulations, the full texts of which are set forth in the Appendix to this Petition as indicated:

U.S. Constitution, Amendment X (App. 87)
5 U.S. Code § 706 (App. 87)
16 U.S. Code §§ 1271, 1273, 1278, 1281, and 1286 (App. 88-97)
42 U.S. Code § 4332 (App. 97-100)
California Constitution, Article III, § 3; Article IV, § 1; and Article V, § 1 (App. 100)
California Public Resources Code § 5093.50 *et seq.*, as enacted by Cal. Stats. 1972, c. 1259 (including 1973 amendment by Cal. Stats. c. 499.) (App. 104-110)
California Public Resources Code § 5093.50 *et seq.*, as amended by Cal. Stats. 1982, c. 1481 (App. 111-139)
California Water Code §§ 10004, 12938 (App. 101-103)
40 C.F.R. §§ 1502.14, 1502.16, 1502.25, 1503.2 and 1503.4 (App. 140-143)
40 C.F.R. §§ 1506.9, 1506.10 (App. 143-145)
Department of the Interior Procedures (45 Fed. Reg. 27541, April 23, 1980 (App. 146-181)

BASIS FOR JURISDICTION BELOW

The jurisdiction of the district court was invoked pursuant to 28 U.S. Code, Sections 1331, 1361, and 1651.

STATEMENT OF THE CASE

This case arises out of an action taken by the outgoing United States Secretary of the Interior under the federal Wild and Scenic Rivers Act, 16 U.S.C. § 1271, *et seq.*, (hereinafter the "Federal Act"). On January 19, 1981, the eve of his departure from office, Cecil D. Andrus signed a document by which he purported to place some 2,400 miles of five California rivers[1] in the National Wild and Scenic Rivers System (hereinafter the "National System"). He acted in response to a July 18, 1980 request from then-Governor of California Edmund G. Brown, Jr., cooperating

[1]The Eel, Smith, Trinity, and Klamath Rivers (the "North Coast" rivers), and the American River. The American River is located in a completely different area of the state from the North Coast, and its included length totalled only 23 miles. (See. App. 82-86.)

in an accelerated process that was admittedly designed to ensure that Secretary Andrus, rather than the Secretary appointed by the new administration, would rule on the request.[2]

Secretary Andrus acted in this cursory fashion in the face of the fact that inclusion of the rivers in the National System would shift more than thirty percent of California's natural water supply from state to federal control.[3] In addition, his decision conflicted directly with a contemporaneous interpretation of relevant California law rendered by the appropriate California court in an ancillary judicial proceeding.

The Secretary based his decision on Section 2(a)(ii) of the Federal Act, 16 U.S.C. § 1273, subd. (a)(ii).[4] That sec-

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[2]Appendix S hereto (7/21/80 memorandum from Department of the Interior staff to Secretary Andrus):

> The state is seeking a final decision on its petition prior to Secretary Andrus' departure. It believes that the climate for positive response exists now and therefore wants to have action taken prior to any change of personalities.

(App. 199.)

[3]That flow represents about 20 million acre-feet of water annually, 10 times greater than the firm water supply presently available to California's multi-billion dollar State Water Project (App. 44.)

[4]When Congress enacted the Federal Act in 1968 (Pub. L. 90-542, October 2, 1968, 82 Stat. 906), 16 U.S. Code § 1273 was Section 2 of Public Law 90-542. Subsequent amendments, not material here, have since been made to 16 U.S. Code § 1273, by Section 1 of Public Law 94-407, and by Section 761 of Public Law 95-625. For convenience, 16 U.S. Code § 1273, subdivision (a)(ii) will be referred to throughout this Petition as either "Section 2(a)(ii) of the Federal Act" or "16 U.S. Code § 1273, subd. (a)(ii)." That measure provides:

> The national wild and scenic rivers system shall comprise rivers (i) that are authorized for inclusion therein by Act of Congress, or (ii) that are designated as wild, scenic or recreational rivers by or pursuant to an act of the legislature of the State or States through which they flow, that are to be per-

tion allows the Secretary to add a river to the National System upon a state governor's request if: (1) the state's legislature has designated the river as wild, scenic or recreational; and (2) the state agrees to permanently manage the river for those purposes under federal criteria that prohibit, among other things, development of the river for water supply. 16 U.S.C. §§ 1273, 1278, 1286.

Although California's Legislature had previously designated the rivers as wild, scenic or recreational under the California Wild and Scenic Rivers Act (hereinafter the

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manently administered as wild, scenic or recreational rivers by an agency or political subdivision of the State or States concerned that are found by the Secretary of the Interior, upon application of the Governor of the State or the Governors of the States concerned, or a person or persons thereunto duly appointed by him or them, to meet the criteria established in this chapter and such criteria supplementary thereto as he may prescribe, and that are approved by him for inclusion in the system, including, upon application of the Governor of the State concerned, the Allagash Wilderness Waterway, Maine; that segment of the Wolf River, Wisconsin, which flows through Langlade County; and that segment of the New River in North Carolina extending from its confluence with Dog Creek downstream approximately 26.5 miles to the Virginia State line. Upon receipt of an application under clause (ii) of this subsection, the Secretary shall notify the Federal Energy Regulatory Commission and publish such application in the Federal Register. Each river designated under clause (ii) shall be administered by the State or political subdivision thereof without expense to the United States other than for administration and management of federally owned lands. For purposes of the preceding sentence, amounts made available to any State or political subdivision under the Land and Water Conservation Act of 1965 [16 U.S.C.A. § 4601-4 et seq.] or any other provision of law shall not be treated as an expense to the United States. Nothing in this subsection shall be construed to provide for the transfer to, or administration by, a State or local authority of any federally owned lands which are within the boundaries of any river included within the system under clause (ii).

"State Act"),[5] the designation was equivocal with respect to the Eel River. By statute the state legislature had explicitly ordered further studies to determine the need to delete that river from the State System in order to permit construction of water supply or flood control facilities.[6] Even more significantly, the Legislature had expressly deferred any commitment for permanent administration of any of the five rivers until after it had approved a management plan which had yet to be completed or submitted to it.[7]

Petitioners sued Governor Brown in state court for declaratory relief and to enjoin him from proceeding with his request to add the rivers to the National System. Petitioners' complaint asserted that the conditional nature of the Legislature's designation of the Eel River and the absence of legislatively-approved management plans for any of the five rivers prevented the Governor from com-

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[5]In 1972 California enacted its own Wild and Scenic Rivers Act, California Public Resources Code § 5093.50 *et seq*. The full text of the State Act as effective during the time frame concerned in this litigation is reproduced in the Appendix to this Petition at App. 104-110.

In 1982 the State Act was amended by California Stats. 1982, chapter 1481, which became effective on January 1, 1983. This measure was expressly made inapplicable to the herein litigation. Cal. Stats., c. 1481, § 19 (App. 139). The full text of Chapter 1481 is reproduced in the Appendix to this Petition at App. 111-139.

All references throughout this Petition to the State Act or portions thereof are to the Act as effective during the events which gave rise to this litigation (*i.e.*, the Act as effective from prior to July 18, 1980, until January 1, 1983, the effective date of Chapter 1481), unless otherwise indicated.

[6]Please see discussion at pp. 14-16, *infra*.

[7]California Public Resources Code § 5093.58 (App. 108.) Please see discussion at pp. 16-18 and accompanying footnotes 15-18, *infra*.

mitting the state to permanent administration of the rivers under the required federal criteria.[8]

On December 5, 1980, six weeks before the Secretary acted, Fred W. Marler, Jr., presiding judge of the California State Superior Court for the County of Sacramento, issued a memorandum decision in which he interpreted the State Act. In relevant part, Judge Marler's decision observed:

> . . . [T]he Legislature did not intend that the Governor could bypass the necessity for legislative approval of management plans by placing the component rivers under a federal program which would place them beyond the management plan approval which the Legislature has reserved to itself.
>
> The conclusion the Court reaches as to statutory construction of California law is that the present state of law and fact in California is such that the Secretary of Resources cannot guarantee to "permanently administer" the five rivers designated by statute. Whether or not Congress intended the same interpretation of the phrase "permanently administer" as the interpretation given by a state Court of a state making application is unknown. However, by way of a dictum, this Court notes that an attempt by Congress to confer power upon a governor in excess of that conferred under state law would be constitutionally suspect.

(App. 186.)[9]

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[8]*County of Del Norte, et al. v. Edmund G. Brown, Jr., et al.*, State of California, County of Sacramento, Superior Court action no. 292019 (filed October 20, 1980).

[9]On April 7, 1981, following protracted further hearings held at the insistence of counsel for the Governor, the state court entered its final judgment, which provided in pertinent part:

> 4. The present state of law and fact under the California Act is such that the Secretary of Resources cannot guarantee

While petitioners' state court action was proceeding, the County of Del Norte and others, who are expected to be petitioners to this Court for writ of certiorari in Ninth Circuit Court of Appeals consolidated cases numbers 83-1761 and 83-2018 (the "North Coast petitioners"), filed a lawsuit in the United States District Court seeking injunctive and declaratory relief against Secretary Andrus and other federal officials. (*County of Del Norte, et al. v. Cecil D. Andrus, et al.*, N.D.-Cal., Docket No. C-80-3964-WAI, filed October 20, 1980.) Petitioners herein followed suit on January 6, 1981. (*County of Del Norte, et al. v. Cecil D. Andrus, et al.*, N.D.-Cal., Docket No. C-81-0035-SAW, filed January 6, 1981.) Both lawsuits sought to enjoin the federal officials from any further processing of the Governor's application for inclusion of rivers, on the bases that the rivers were ineligible for such action and that the environ-

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to "permanently administer" the five rivers in the California system.

• • •

6. The Legislature did not intend that the Governor could bypass the necessity for legislative approval of management plans by placing the component rivers of the California System under a federal program which would place them beyond the management plan approval which the Legislature has reserved to itself.

• • •

IT IS ORDERED, AND JUDGED, AND DECREED as follows:

1. Under the California [Wild and Scenic Rivers] Act, neither the Governor nor the Secretary of Resources of the State of California presently has power to permanently administer the rivers that are components of the California System as wild, scenic or recreational rivers in the absence of legislatively-approved management plans, and until such management plans have been approved by the Legislature, neither official can guarantee that any of those rivers will be permanently administered as wild, scenic or recreational rivers.

(App. 193-195.)

No one appealed, and the state court's judgment became final.

mental review procedures taken under the National Environmental Policy Act ("NEPA") were fatally defective in a number of specified respects.

On December 23, 1980, and January 13, 1981, the North Coast petitioners and the herein petitioners, respectively, brought motions in the district court for summary declaratory judgment and injunctive relief, on the grounds that: (1) as discussed above, the rivers were ineligible for inclusion in the National System; and (2) in any event, the Secretary of the Interior could not validly act on the Governor's request any sooner than January 21, 1981, under applicable federal regulations. On January 16, 1981, following three days of hearings, the district court entered an order declaring that the Secretary of the Interior could take no action on Governor Brown's application until January 21, 1981, the end of the thirty-day period prescribed by applicable federal regulations, 40 C.F.R. §§ 1506.9, 1506.10. (App. 72-79.)

On January 19, 1981, the United States Court of Appeals for the Ninth Circuit ordered the district court's judgment and injunctive order vacated, and remanded the case to the district court with directions to dismiss, on the basis that since no "final agency action" had yet occurred, the case was not ripe for judicial resolution. (App. 80-81.) Later that day, some four hours before he left office, Secretary Andrus, either interpreting state law differently from the state court or simply ignoring the state court's ruling, signed the document purporting to grant the Governor's request.

It is clear from the record in this case, as noted by the district court, that political considerations heavily influenced the timing of the Governor's application and the Department of the Interior's response to it.[10] Thus, the

[10]See footnote 2, *supra*, and App. 27-28.

"Cooperative Work Agreement" between the state and federal agencies responsible for processing the application explicitly provided that their respective representatives would "agree on interim deadlines for completion of the subject documents in the time frame that would allow for a Secretarial decision to be reached by early January, 1981," *i.e.*, before Secretary Andrus left office if the incumbent federal administration were not reelected in November, 1980. (App. 205.) Furthermore, a federal official involved in the processing of the request observed, early on in the process, that the environmental review which the state and federal officials planned to conduct in six months' time would, "under the most optimum conditions," normally require a year or more. (App. 199.)

After Secretary Andrus acted, petitioners filed a new lawsuit in the United States District Court, seeking a judicial declaration that his action was invalid for the same three reasons urged in the previous lawsuit, viz., the rivers' ineligibility for inclusion in the National System, the federal officials' violation of the applicable timing regulations, and the inadequacy of the Final Environmental Impact Statement ("FEIS"). In response to petitioners' motion for summary declaratory judgment on all three causes of action, the district court entered summary judgment declaring that Secretary Andrus' act was void because (1) it had been taken in violation of the thirty-day timing regulations, 40 C.F.R. §§ 1506.9, 1506.10, and (2) the state court's interpretation of state law had not been adequately considered by the Secretary. (App. 21-34.) The district court denied petitioners' motion insofar as they sought summary judgment declaring that the FEIS was inadequate. The court expressly noted that the record presented triable issues of material fact on that question. (App. 31, 33.) Neither defendants nor intervenors filed a cross motion for summary judgment.

The United States and the intervenors appealed, but the State of California did not. The Ninth Circuit Court of Appeals reversed the district court without reaching the principal substantive questions presented by this case, *i.e.*, whether the Secretary can validly place in the National System, a river which the state (1) has not unequivocally designated as wild, scenic or recreational or (2) has not agreed to permanently administer in the absence of further state legislative action. Instead, the court of appeals held that the federal defendants' violation of the thirty-day timing regulation, accomplished through the use of a false affidavit signed by a Department of the Interior employee (App. 8), was mere "trivial error" which did not justify invalidation of the Secretary's act. The court further held that under the presumption of regularity which attaches to administrative officials' acts, the presence in the administrative record of a legal memorandum mentioning Judge Marler's December 5, 1980 decision required that Secretary Andrus' action be upheld. The Ninth Circuit remanded the case to the district court "for entry of judgment in favor of the defendants." (App. 10.)

Petitioners sought rehearing, pointing out that the substantive issues of eligibility had not been addressed, and that entry of judgment in favor of the defendants was inappropriate since the district court had expressly reserved the issues presented by the third cause of action for trial. (App. 12-20.) On July 5, 1984, the Ninth Court denied the petition for rehearing, stating in its order:

> This court reviewed all of the theories of the plaintiffs' motion for summary judgment in order to determine whether there were any grounds for affirmance of the district court's decision. (Citation.) The district court correctly denied plaintiffs' motion for summary judgment to the extent it was based upon a claimed inadequacy of the environmental impact statement. The plaintiffs have never identified any triable issues of

fact in connection with that claim, and we have determined there are none.

(App. 11.)

ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI

I

THIS CASE PRESENTS IMPORTANT FEDERAL QUESTIONS THAT DESERVE THE ATTENTION OF THIS COURT

This case raises significant issues of federal law and policy which have potentially far-reaching impact nationwide and merit the attention of this Court. One issue of first impression is whether Congress gave the Secretary of the Interior power, under Section 2(a)(ii) of the federal Wild and Scenic Rivers Act, to override a state court and thereby deprive a state of administrative authority over its rivers by substituting his own notion of what constitutes "permanent administration" for a state court's interpretation of the applicable state law on that subject. The interpretation of this federal statute is of national import, for it will have impact on the utilization of public lands throughout the nation. Cf., *U.S. v. Coleman* (1968) 390 U.S. 599, 601.

This case thus also raises the broader question of the extent to which a federal administrative official may reject a state court's contemporaneous interpretation of a state law which he must understand in order to properly apply the federal law. These questions present important issues of federalism and merits further definition by this Court.

Another question of first impression raised by this case, is whether an outgoing federal administrative regime may, with the aid of a false affidavit signed by one of its employees, violate published regulations with impunity by taking refuge in the "trivial error" doctrine. The Ninth Circuit's

opinion has put a judicial stamp of approval on a series of actions which enabled a "lame duck" administration to accomplish an avowedly politicized goal by bending the rules prescribed by applicable federal regulations, 40 C.F.R. §§ 1506.9 and 1506.10. This troublesome application of the "trivial error" doctrine raises the spectre of a recurring open hunting season during which future outgoing administrations may freely reach beyond the limits of their terms in office by ignoring the plain meaning of regulatory enactments. This Court's certiorari jurisdiction should appropriately be exercised to address the important public policy issues raised by the Ninth Circuit's sweeping application of the "trivial error" rule.

The Ninth Circuit's opinion also raises important issues regarding a reviewing court's responsibility to independently review federal agency interpretation of state law, and its ability to prejudicially prevent trial of unresolved, triable issues of material fact.

Over two-thirds of California's people and one-quarter of its lands[11] will feel the direct impact of this case, for if left untouched the Ninth Circuit's opinion will have the immediate effect of precluding water supply development on rivers to which water suppliers throughout the state of California have looked for at least 25 years[12] for the development of future water supplies to meet the needs of California's growing population.[13]

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[11]See App. 144.

[12]I.e., since passage of the Burns-Porter Act (Cal. Water Code § 12390 *et seq.*) and the legislative adoption of the California Water Plan (Water Code § 10004) in 1959. See App. 49-51.

[13]See App. 43. When it enacted the State Act in 1972, the California Legislature expressly recognized the potential need to develop the Eel River, by its mandate that further studies be conducted to determine if the Eel should be deleted from the State System. Cal. Pub. Res. Code § 5093.54, subd. (d); § 5093.56; § 5093.57.

Beyond this direct impact on the people of California, this case has potential indirect impact nationwide due to the broad scope of power to affect state resources, which the Ninth Circuit's decision appears to give to the Secretary of the Interior under 16 U.S.C. § 1273, subd. (a)(ii); and due to the disturbing precedent which that decision sets for legitimating "parting shots" made without observance of published federal regulations, by outgoing federal administrations.

The importance of the federal questions presented, and the far-reaching impact which resolution of these questions will have, warrant the exercise of this Court's certiorari jurisdiction to remedy the defects in the Ninth Circuit's opinion below.

II

THE SECRETARY OF THE INTERIOR ERRED AS A MATTER OF LAW IN ADDING THE AFFECTED RIVERS TO THE NATIONAL SYSTEM

The Secretary of the Interior effectively overrode the contemporaneous interpretation by a state court of state law, and approved the addition of the five California rivers to the National System. He purported to act on the basis of authority granted to him under Section 2(a)(ii) of the Federal Act, 16 U.S.C. § 1271 *et seq.* By allowing the Secretary to add rivers to the National System, Section 2(a)(ii) carves out an exception to the Federal Act's basic design that rivers should be added to the National System "by Act of Congress."[14]

The Secretary's decision clearly exceeded the bounds of his statutory authority, for a state court had ruled that under state law the rivers did not meet the basic statutory requirement that the state first commit itself to perma-

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[14] 16 U.S. Code § 1273, subd. (a)(1), reprinted in full at footnote 4, *supra*.

nently administer the rivers as wild, scenic or recreational under criteria contained in the Federal Act. With respect to the Eel River, this lack of commitment was manifested by the conditional nature of the State Act's designation of the river as wild, scenic or recreational. The California Legislature specifically identified the possibility that it would remove the Eel from the State System if it found a need to construct water supply or flood control impoundments which the Federal Act prohibits. Cal. Pub. Res. Code §§ 5093.54, subd. (d), 5093.56, 5093.57.

With respect to all five rivers, the Legislature had expressly conditioned their permanent administration on its subsequent approval of management plans which had not even been submitted to it. Therefore, as the state court held, neither the Governor of California nor any other member of the state's executive branch of government had the power to permanently administer, or to guarantee permanent administration of, the rivers as required by the Federal Act. In these circumstances, the Secretary's misapprehension of the scope of his own statutory authority had the additional flaw of violating California's constitutional distribution of powers between the Governor and the Legislature.

A. The Secretary Exceeded His Authority When He Destroyed the California Legislature's Expressly Reserved Option to Develop the Eel River to Meet the Needs of California's People

One of the most obvious defects in the Secretary's action is his failure to recognize that California's designation of the Eel River as wild, scenic or recreational reserves legislative authority to remove that designation and allow construction which the Federal Act prohibits. When the California Legislature established the State System in 1972, Cal. Pub. Res. Code § 5093.50 *et seq.*, it carefully reserved authority "to delete all or any segment" of the Eel River from the State System if and when it became necessary to develop that river for water supply

or flood control purposes. Cal. Pub. Res. Code § 5093.54, subd. (d).

The Legislature preserved this authority because of continuing uncertainties over California's ability to provide additional water supplies needed to support its future population and economy, and because California had historically considered the Eel River as an important potential source for those supplies. Indeed, the State undertook the financing and construction of its multi-billion dollar State Water Project (SWP) in reliance on feasibility reports that assumed eventual development of one million acre-feet of annual water supply from the Eel River. (App. 49-51; App. 54-55.) In addition, the ten public water agency petitioners have each entered into a long-term multi-million-dollar water supply contract with the State, that identifies the Eel River as a potential source for at least a portion of the additional two million acre-feet that the State still needs to develop in order to meet its long-term SWP contract obligations. (App. 50-52.)

Thus, the California statute that designates the Eel River as part of the State System also directs California's Department of Water Resources (DWR) to report to it after 1984 on "the need for water supply and flood control projects on the Eel River and its tributaries." Cal. Pub. Res. Code § 5093.54, subd. (d). That statute also expressly authorizes DWR to undertake all "necessary or desirable" studies "to determine the feasibility of alternate sites for dams on the Eel River and its tributaries." Cal. Pub. Res. Code § 5093.56.

In contrast, the Federal Act prohibits construction of dams or other impoundments on rivers in the National System. 16 U.S.C. §§ 1271 and 1286, subd. (d). In addition, the Federal Act prohibits all federal agencies from licensing or otherwise assisting in the "construction of any water resources project" that would have a direct effect on the free-flowing nature of any river in the National System. 16 U.S.C. § 1278, subd. (a).

The Secretary's authority to add a river to the National System requires that he find that the river will be permanently managed by the state to meet the criteria established in the Federal Act, 16 U.S.C. § 1273, subd. (a)(ii). Clearly, California has not agreed to permanently administer the Eel as a wild, scenic, or recreational river, since California's statutes expressly order further studies leading to the possibility of the construction of dams and other facilities on that river.

Congress certainly did not intend to allow the Secretary to preempt states' rights by precluding a state from further water resource development of a river where the state legislature has unequivocally stated its plans to give further consideration to the state's need for such development. Instead, Congress imposed a requirement for unequivocal state legislative designation so that the Secretary could not act to curtail a state's ability to manage its rivers without the concurrence of the state's legislature. The purpose of Congress' requirement that the state's legislature designate the river as wild, scenic or recreational will be completely undermined if the Secretary is allowed to unilaterally deprive the California Legislature of its reserved authority to develop the Eel River's water resources in the future.

The California Act's designation of the Eel River as a wild, scenic or recreational river manifestly does not contain an unequivocal designation of, nor a plan for permanent administration of, the Eel River as wild, scenic or recreational. On its face, that Act reserves authority for potential development. The Secretary's determination that the Eel River met the Federal Act's requirements for inclusion in the National System was therefore an abuse of discretion and an act in excess of his statutory authority, and should be held unlawful. 5 U.S.C. § 706, subd. (2).

B. The Secretary Exceeded His Authority When He Overrode a State Court's Interpretation of State Law

At the time Governor Brown asked Secretary Andrus to place the North Coast rivers in the National System, the

State Act provided only a partial delegation of power to the executive branch of state government with respect to administration of the rivers.

Although the California Legislature had placed the five rivers in the State System[15] and had placed their administration in the hands of the California Secretary for Resources,[16] it had imposed a crucial limitation on his administrative powers. The Legislature required that, before he could "permanently administer" the system, the Secretary for Resources must do all of the following:

> (a) Determine which of the classes described in Section 5093.53 [*i.e.*, wild, scenic, or recreational] best fit each segment of the rivers included in the system.
>
> (b) Prepare a management plan to administer the rivers and their adjacent land areas in accordance with such classification.
>
> (c) *Submit such management plan to the Legislature for its approval.*

Cal. Pub. Res. Code § 5093.58, as enacted by Stats. 1972, c.1259, p.2510, § 1[17] (emphasis added).

No management plan existed for any of the rivers at the time the Governor made his application, and none existed when Secretary Andrus purported to grant Governor Brown's request. (App. 184.) As the state court held in interpreting the State Act, this legislative reservation of power presented an insurmountable obstacle to the Governor's attempt to claim that the rivers were then "to be permanently administered . . . by the State" in accordance with the criteria of the Federal Act:

> While the Resources Secretary does have some power with respect to components of the [State] System . . ., these powers are in the nature of preservation of the rivers in their free-flowing natural condition until

[15] Cal. Pub. Res. Code § 5093.54.

[16] See, Cal. Pub. Res. Code §§ 5093.52, 5093.55, 5093.58, 5093.59, 5093.60 (App. 104-109).

[17] Please see footnote 5, *supra*.

plans for the complete management and administration of the System are approved by the Legislature. It is clear that the Legislature did not intend that the Resources Secretary could administer the System in the interim in such fashion as to avoid the duties mandated by the Act.

It further appears that the Legislature did not intend that the Governor could bypass the necessity for legislative approval of management plans by placing the component rivers under a federal program which would place them beyond the management plan approval which the Legislature has reserved to itself.

The conclusion the Court reaches as to statutory construction of California law is that the present state of law and fact in California is such that the Secretary of Resources cannot guarantee to "permanently administer" the five rivers designated by statute. Whether or not Congress intended the same interpretation of the phrase "permanently administer" as the interpretation given by a state court of a state making application is unknown. However, by way of dictum, this Court notes that an attempt by Congress to confer power upon a governor in excess of that conferred under state law would be constitutionally suspect.

(App. 185-186.)

In these circumstances, the Secretary's action, based upon his interpretation of state law in a manner contrary to the state Court's, was clearly reversible as having been rendered "in excess of his statutory authority", 5 U.S.C. § 706, subd. (2)(C), and as having been "arbitrary, capricious, [and] otherwise not in accordance with the law", 5 U.S.C. § 706, subd. (2)(A).

C. The Secretary's Approval Effectively Violated the State's Constitutional Delegation of Powers

California's Constitution provides that:

The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of

> one power may not exercise either of the others except as permitted by this Constitution.

Cal. Const., Art. III, § 3. Under California law, the power to designate rivers as wild, scenic or recreational, and to approve plans to guarantee permanent administration as such, resides in the Legislature. However, the Secretary attributed that power to the Governor, thus interfering with the state's separation of legislative and executive powers, Cal. Const., Art. III, § 3.

By accepting the Governor's representations that the state would permanently administer the rivers as wild, scenic or recreational rivers under the Federal Act's criteria, the Secretary ran afoul of California's constitutional delegation of powers. As the state court observed, the Governor could not guarantee the necessary "permanent administration," because the Legislature had not yet completed the statutory process for determining how those rivers would be administered in the future. It had not approved (or even received) any of the management plans which the State Act required. Cal. Pub. Res. Code § 5093.58. Nor had it determined whether water supply or flood control impoundments might need to be built on the Eel River to meet future needs, as the State Act contemplated. Cal. Pub. Res. Code §§ 5093.54, subd. (d), 5093.56, 5093.57. The Secretary thus erroneously ascribed to the Governor the power to guarantee permanent administration, a power which he did not possess under California law since the Legislature had retained the power to determine whether, and to what extent, California would permanently administer the rivers.

The Secretary was not without guidance concerning this facet of California law. Judge Marler had stated in his decision that:

> [T]he Legislature did not intend that the Governor could bypass the necessity for legislative approval of management plans by placing the component rivers under a federal program which would place them be-

> yond the management plan approval which the Legislature has reserved to itself.[18]

Moreover, the Governor had a constitutional obligation to preserve the Legislature's continuing authority to determine how the rivers would be permanently managed, and whether to construct water supply or flood control projects in the future on the Eel River. California's Constitution expressly charges the Governor to "see that the law is faithfully executed." Cal. Const., Art V, § 1. That law necessarily includes the State Act.

This Court has long held that the distribution of the powers of a state government between the several branches thereof is a matter for the state to determine, without interference from the federal government. *Highland Farms Dairy v. Agnew* (1936) 300 U.S. 608. The Tenth Amendment to the United States Constitution states that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Nowhere in the Constitution is the federal government delegated the power to determine the distribution of the internal governmental power of the sovereign states. Neither does it prohibit the states from distributing that power as each state sees fit. Consequently, that is a power reserved to the states under the Tenth Amendment.

In the Federal Act, Congress authorized the Secretary to determine whether the state's government had established the preconditions necessary for inclusion in the National System. Congress did not, however, intend to authorize the Secretary to determine how the state government could allocate among its various branches of the power to create those preconditions. Instead, Congress explicitly required a *legislative* designation as wild, scenic or recreational rivers:

> The national wild and scenic rivers system shall comprise rivers (i) that are authorized for inclusion

[18]App. 186.

> therein by Act of Congress, or (ii) that are *designated as wild, scenic or recreational rivers by* or pursuant to *an act of the legislature of the State or* States *through which they flow,* that are to be permanently administered as wild, scenic or recreational rivers by an agency or political subdivision of the State or States concerned that are found by the Secretary of the Interior, upon application of the Governor of the State or the Governors of the States concerned, or a person or persons thereunto duly appointed by him or them, to meet the criteria established in this chapter and such criteria supplementary thereto as he may prescribe, and that are approved by him for inclusion in the system. . . .

16 U.S.C. § 1273, subd. (a) (emphasis added).

Under the law of the State of California, the legislative power to establish the preconditions for inclusion in the National System is reserved to the legislature. The effect of the Secretary's action was to reallocate the division of governmental authority from the Legislature to the Governor in a manner contrary to the state constitution. This action violated the Tenth Amendment and the rule enunciated in such cases as *Highland Farms Dairy v. Agnew,* 300 U.S. 608, and warrants review and reversal by this Court.

III

THE COURT OF APPEALS DID NOT FULFILL ITS DUTY TO INDEPENDENTLY REVIEW THE SECRETARY'S INTERPRETATIONS OF LAW

The Court of Appeals failed to properly review the Secretary's interpretation of legal issues in at least two respects: It failed to review the adequacy of the Secretary's decision for errors of law generally, and, more specifically, if failed to independently review the Secretary's interpretation of state law. The appellate court merely determined that the related contemporaneous judgment of the California court interpreting the relevant state law had been "drawn to the Secretary's attention" and presumed that

the Secretary had considered it (App. 10). Apparently, the court felt that so long as the Secretary had considered all relevant material, it could not substitute its judgment for that of the Secretary. See, *Citizens to Preserve Overton Park, Inc. v. Volpe* (1971) 401 U.S. 402.

However, the appellate court erred in applying the somewhat narrow *Overton Park* standard of review of agency *judgment* to the secretary's decision, which involved *a legal determination* of state statutes and judicial decisions rather than an exercise of discretionary "judgment".

The Secretarial action reviewed in *Overton Park* was an authorization of the use of federal highway funds to contruct a highway through a public park. The Secretary was empowered to authorize the use of such funds only where he determined that no feasible alternate route existed or that all possible planning to minimize harm to the park had been done. No questions of law were before the Secretary; rather, he had merely to determine whether the facts justified the findings necessary for authorization of the funds. This Court held that a reviewing court in that situation had the responsibility to review the facts, but only to determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *(Overton Park, supra,* 401 U.S. 416.)

The issue here is not whether the Secretary reasonably exercised his judgment on the facts, but whether he was correct in his determination of the applicable state law. In reviewing the Secretary's legal conclusion, the appellate court was obliged to do more than merely determine that the Secretary had considered all relevant factors; the court was required to make its own determination of the underlying legal issues.

When adding rivers to the National System under Section 2(a)(ii), the Secretary is required to decide whether state law provides the preconditions necessary for inclu-

sion. Consequently, in the case at bench, the Secretary of the Interior was called upon to interpret California law to determine whether California would permanently administer the rivers as wild, scenic or recreational within the meaning of Section 2(a)(ii) of the Federal Act, which requires that:

> 1. The State Legislature have designated the rivers as wild, scenic or recreational rivers;
>
> 2. The State have committed itself to permanently administer the rivers as wild, scenic or recreational rivers at no expense to the United States; and
>
> 3. The Secretary find that the rivers meet the federal criteria for wild, scenic and recreational rivers.

16 U.S.C. § 1273(a)(ii) (App. 88, 89).

The last of these three requirements may be said to call for a Secretarial exercise of discretion, in the sense that he must determine whether a river meets the qualitative criteria of the Federal Act[19] and is worthy of inclusion in the National System. But there is no similar exercise of discretion to be made concerning the first two requirements, (1) that the state legislature have designated the river as wild, scenic or recreational, and (2) that the state have made a commitment to permanently administer the river under the Federal Act's criteria.

The Secretary's conclusion that the California rivers met those requirements consequently required an interpretation of law, in this case the State Act, Pub. Res. Code § 5093.50 *et seq.*, and of the related rulings of the California courts. And, where state case law has interpreted the statute in question, that law must be followed by the federal courts, absent exceptional circumstances. *Mullaney v. Wilbur* (1975) 421 U.S. 684, 691; *Fidelity Union Trust Co. v. Field*

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[19] I.e., to determine whether a river is one "which, with [its] immediate environments, possess[es] outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values. . . ." 16 U.S.C. § 1271 (App. 88).

(1940) 311 U.S. 169. The only proper legal conclusion in this case was that, due to the lack of permanent administration as wild, scenic or recreational by the state, the rivers were ineligible for inclusion in the National System.

In reviewing the Secretary's interpretation of California law, the appellate court had a responsibility to carry out a *de novo* review of the legal issues involved, since it was ruling on an appeal from a grant of summary judgment. *Roberts v. Elaine Powers Figure Salons, Inc.* (9th Cir. 1983) 708 F.2d 1476, 1478, 1481; *Grand Canyon Dories v. Idaho Outfitters and Guides* (9th Cir. 1983) 709 F.2d 1250, 1252 (affirming a legal interpretation that the Federal Wild and Scenic Rivers Act did not preempt a local statute); *State ex rel. Edwards v. Heimann* (9th Cir. 1980) 633 F.2d 886, 888 n.1. (imposing *de novo* review on appeal from summary judgment reviewing administrative agency's construction of state and federal statutes). The Ninth Circuit has also recently clarified its responsibility to give full *de novo* review to state law determinations of the district courts. *Churchill v. F/V Fjord* (en banc; Ninth Circuit Court of Appeals docket number 82-3644, decided August 7, 1984). Certainly, the appellate court should impose at least the same degree of review on state law determinations made by federal administrative agencies.

The court's responsibility to review the underlying legal issues is particularly important where, as here, the summary judgment under appeal was based on an Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*, review of a federal agency's legal determinations. That Act requires the reviewing court to make an independent review of the administrative agency's legal determinations, by directing that:

> To the extent necessary to decision and when presented, the reviewing court *shall* decide all relevant questions of law, interpret constitutional and statutory

> provisions, and determine the meaning or applicability of the terms of an agency action . . .

5 U.S.C. § 706 (emphasis added).

This Court has stated that it is the *duty* of the federal courts to correct agency errors of law:

> When an administrative agency has made an error of law, the duty of the Court is to 'correct the error of law committed by that body, and after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law.' *ICC v. Clyde S.S. Co.*, 181 U.S. 29, 32-33, 21 S. Ct. 512, 514 (1901), 45 L. Ed. 729.

NLRB v. Ent. Ass'n. of Steam, Hot Water, etc. (1977) 429 U.S. 507, 522 n.9; accord, *Nat. Assn. of Greeting Card Pubs. v. USPS* (1983) ..... U.S. ..... [77 L. Ed. 2d 195, 207 n.19].

The Secretary has made an error of law, rather than an error of judgment as asserted in *Overton Park*, and the appellate court had the duty to correct it. Moreover, little deference need be accorded the *federal* agency's construction of *state* law, since that is not a matter within the agency's expertise or discretion. The reviewing courts must therefore make their own independent review of federal agency determinations of state law. See, *State ex rel. Edwards v. Heimann* (9th Cir. 1980) 633 F.2d 886, 888 (state banking law); *Kasey v. Richardson* (4th Cir. 1972) 462 F.2d 757, 759 (state family law); *Baber v. Schweiker* (D.C. 1982) 539 F.Supp. 993, 995 (state family law).

The appellate court did not carry out such a review here. It instead applied the *Overton Park* deferential standard. Application of that deferential standard to the legal determination which the Secretary is required to make under Section 2(a)(ii) is a misreading of the rationale of *Overton* and an abrogation of the reviewing court's "duty" under the Administrative Procedures Act and *NLRB v. Ent. Ass'n. of Steam, Hot Water, etc., supra*, 429 U.S. 507. The Ninth Circuit's opinion should be reversed for its failure to reach and determine this issue.

IV

THE NINTH CIRCUIT'S DECISION ESTABLISHES A DISTURBING PRECEDENT FOR ALLOWING OUTGOING ADMINISTRATIONS FREE LICENSE TO POLITICIZE AGENCY DETERMINATIONS

There is no serious dispute about the fact that political considerations underlay the timing of the various actions which gave rise to this litigation. From the outset one of Governor Brown's and the state and federal defendants' primary goals was to complete the entire decision-making process "in the time frame which would allow for a Secretarial decision" before Secretary Andrus departed from office. (App. 205.) Consistent with this objective, the Secretarial Issue Document was signed at 745 p.m. on the Secretary's last day in office. (App. 86.)

Defendants achieved their goal, with only hours to spare, with the assistance of a false affidavit signed by a Department of the Interior employee, who certified under oath that copies of the FEIS had been distributed to the public when in fact they had not. (App. 17.) This false statement enabled publication of the Notice of Availability of the FEIS to appear in the *Federal Register* one week earlier than it would have, had the truth been told. Had the Notice of Availability been published one week later, in accordance with law, Governor Brown's application would have been referred to Secretary Andrus' successor for action.

The Ninth Circuit Court of Appeals decided that, since this truncation of the thirty-day period described by 40 C.F.R. Section 1509.10 did not operate to deprive petitioners of any substantive right to comment or to further review, the premature publication of the Notice of Availability, accomplished through the use of a false affidavit, should be dismissed as mere "trivial error" with the result that Secretary Andrus' action could be upheld. It is difficult to imagine a clearer statement that an outgoing administration may bend the rules with impunity, in order to

achieve objectives which the normal course of the political process would otherwise put beyond its reach. The Ninth Circuit's decision establishes a disturbing precedent which is distinctly out of harmony with "our historic commitment to the rule of law" which this Court has recognized. *United States v. Nixon* (1974) 418 U.S. 683, 708. This Court should review and reverse the Court of Appeals' decision construing federal regulations in a manner which sanctions such misconduct.

V

THE COURT OF APPEALS IMPROPERLY DEPRIVED PETITIONERS OF THEIR RIGHT TO TRIAL ON THE ADEQUACY OF THE FINAL ENVIRONMENTAL IMPACT STATEMENT

One of the three bases upon which the petitioners sought summary judgment in the district court was that Secretary Andus' action was invalid because it was based on a final environmental impact statement (FEIS) which failed in a number of prescribed particulars to satisfy the requirements of NEPA, 42 U.S. Code § 4321 *et seq.*, applicable Council on Environmental Quality regulations, 40 C.F.R. § 1502.14 et seq. (App. 140-145), and the Department of the Interior procedures, 45 Fed.Reg. 27541-27549 (App. 146-181). Petitioners' moving papers included a number of experts' declarations describing the various ways in which the FEIS was perceived by them to be inadequate. Respondents and Intervenors did not bring any cross-motion for summary judgment on this basis, but filed counter-declarations and argument attempting to demonstrate that the FEIS was *not* inadequate in any of the respects urged by petitioners.

The district court denied petitioners' motion, finding that "none of the . . . issues [identified by petitioners] are susceptible of resolution on motion for summary judgment." (App. 31.) Because petitioners' experts' declara-

tions were controverted in many instances by defendants' experts' declarations, the district court concluded that the record raised a triable issue of material fact sufficient to preclude the granting of summary judgment. As to a number of issues, the court observed:

> These are complex issues of great moment to the future well being of California. The only appropriate vehicle of resolution is trial.

(App. 33.) It is plain from the district court's memorandum decision that the Court perceived triable issues of material fact to be raised by the record, and believed a trial to be necessary in order to resolve the issues thus framed. (See generally, App. 31-34.)

As noted above, the Ninth Circuit's opinion remanded the case to the district court with directions to enter judgment on all causes of action for defendants. While the opinion did not explicitly mention the third cause of action, its broad reach appeared to include the third cause of action. Accordingly, petitioners sought rehearing, pointing out that the district court had explicitly reserved the third cause of action for trial, and inviting the Ninth Circuit to declare that its direction for entry of judgment did not apply to the third cause of action. (App. 12-20.)

The Ninth Circuit's somewhat startling response evinces some confusion over the proper role of a Court of Appeals on review of a trial court order denying summary judgment. The Ninth Circuit's order states:

> The district court correctly denied plaintiffs' motion for summary judgment to the extent it was based upon a claimed inadequacy of the environmental impact statement. The *plaintiffs have never identified any triable issues of fact in connection with that claim, and we have determined there are none.*

(App. 11 (emphasis added).)

It was petitioners' burden, as moving parties in the district court, to establish that *no* triable issues of fact existed. The district court instead found that the record raised such triable issues, and accordingly denied the motion for summary judgment, expressly reserving the third cause of action for trial on the merits. The Ninth Circuit's order effectively gives summary judgment in favor of defendants, nonmoving parties below or on appeal.

While in theory this was at least something short of an extrajurisdictional act, see 6 *Moore's Federal Practice* (2nd ed.), ¶ 56.12, p.56-331, any inherent judicial power to grant summary judgment in favor of a nonmoving party surely must be exercised even at the district court level with great restraint and judiciousness. *Id.* at p.56-334. This limitation applies *a fortiori* to a court of appeals on review of a district court order denying summary judgment. *Fountain v. Filson* (1949) 336 U.S. 681.

In this case, where the district court explicitly found that the record raised important issues of fact which could be appropriately resolved only by trial, the Ninth Circuit clearly overstepped its boundaries in second-guessing the district court's assessment of the factual record before it, and taking away petitioners' right to a trial on the those issues. Had petitioners been on notice that a cross-motion for summary judgment was pending against them on the basis that the FEIS was conclusively *adequate* as a matter of law, petitioners could have prepared a factual showing sufficient to meet such contentions and preserve their right to determine by plenary trial whether the FEIS was adequate. The Ninth Circuit's order directing entry of judgment in favor of defendants operated to deprive petitioners, without notice or hearing, of their right to a day in court on those issues. This represents a substantial infringement of petitioners' rights to due process, and warrants reversal of the Ninth Circuit's decision.

CONCLUSION

Important questions of federal law and policy with significant potential impact nationwide are raised by this case. At bench is a question of first impression concerning the scope of the power Congress gave to the Secretary of the Interior when it authorized him to place a state's rivers in the National Wild and Scenic Rivers System under Section 2(a)(ii) of the federal Wild and Scenic Rivers Act. In addition, this case presents a question of first impression concerning the extent to which the doctrine of "trivial error" should allow a departing federal official to effectively extend his tenure through the violation of valid and applicable federal regulations. Finally, this case presents of important nationwide issues concerning the scope of review which federal courts should give to federal administrators' interpretations of law, and the extent to which a federal Court of Appeals may grant summary judgment in favor of a nonmoving party when the district court has found that triable issues of material facts are presented by the record before it.

Because these are special and compelling reasons justifying the exercise of this Court's certiorari jurisdiction, petitioners respectfully request that the Court grant their petition and issue its writ of certiorari in this case to the United States Court of Appeals for the Ninth Circuit.

Dated: October 1, 1984

Respectfully submitted,

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